APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED FEBRUARY 28, 2005

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-15501

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., a.k.a. SC CONDOMINIUM ASSOCIATION, INC.,

Petitioner-Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

(February 28, 2005)

Before CARNES and COX, Circuit Judges, and STROM*, District Judge.

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

Appendix A

STROM, District Judge:

This case is before the Court on the petition of the Shore Club Condominium Association, Inc. ("the Association"), to review and set aside an order of the National Labor Relations Board ("the Board"). The Association, a nonprofit Florida corporation, provides maintenance and security services to the owners and residents of the Shore Club Condominium. The condominium property consists of a recreational area and two residential towers in Fort Lauderdale, Florida. The two residential towers, which contain 192 units and an above-ground garage below each tower, are located at 1901 and 1905 North Ocean Drive. The recreational area, which includes beach property, a recreational building, and a pool, is located at 1912 North Ocean Drive. The Association employs a lead maintenance employee and four other maintenance employees, including one who functions primarily as a painter, and three cleaners who perform janitorial functions.

On April 3, 2003, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 390, AFL-CIO ("the Union") filed a petition with the Board seeking certification as the collective-bargaining representative of the Association's maintenance employees. The Association opposed the Union's petition, claiming that the unit sought was inappropriate because it consisted of domestic employees, who are excluded by Section 2(3) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 151 *et seq.* Following an evidentiary hearing on April 17, 2003, the Regional Director issued a decision finding the following unit

appropriate for the purpose of collective bargaining: "All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by the [Association] at its facility in Ft. Lauderdale, Florida, excluding all office employees, security employees, guards and supervisors as defined in the Act." The Regional Director then conducted a secret-ballot election in the specified unit on June 11, 2003, in which there was a 5-0 vote in favor of representation by the Union. Thus, on July 22, 2003, the Regional Director certified the Union as the exclusive collective-bargaining representative of the Association's maintenance employees.

Following the certification, the Union requested bargaining and the Association refused. The Union then filed an unfair labor practice charge, asserting that the Association's refusal to bargain violated the Act. Upon an investigation, the Board's General Counsel issued a complaint alleging that the Association violated Sections 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Association filed an answer admitting its refusal to bargain, but arguing that the Board had improperly certified the Union. On September 30, 2003, the Board granted the General Counsel's motion for summary judgment and ordered the Association to bargain with the Union. The Board held that the employees in question were not domestic employees within the meaning of Section 2(3) of the Act, and therefore the Association violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The Association filed a petition for review on October 29, 2003, arguing that the Board erred when it failed to hold

that the unit employees were domestic employees excluded from the Act's coverage by Section 2(3). The Board filed a cross-application for enforcement of the Board's order on November 25, 2003. We find that the Association's position is contrary to established Eleventh Circuit precedent and hold that the Board's order must be enforced.

Standard of Review

The Board's finding of an unfair labor practice "must be upheld if it is based upon substantial evidence contained in the record taken as a whole, and based upon reasonable inferences drawn from the facts as found." *NLRB. v. Imperial House Condominium, Inc.,* 831 F.2d 999, 1006 (11th Cir.1987). "Because of the Board's 'special competence' in the field of labor relations, its interpretation of the Act is accorded substantial deference." *Id.* at 1005, citing *Pattern Makers' League of North America v. NLRB,* 473 U.S. 95, 100, 105 S.Ct. 3064, 3068, 87 L.Ed.2d 68 (1985). "[T]he remedy chosen by the Board must 'be given special respect by reviewing courts.' " *Imperial House,* 831 F.2d at 1006, citing *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969). "So long as the Board has made a plausible inference from the record evidence, we will not overturn its determinations, even if we would have made different findings upon a *de novo* review of the evidence." *Cooper/T. Smith, Inc. v. NLRB,* 177 F.3d 1259, 1261 (11th Cir.1999).

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Discussion

Section 2(3) of the Act excludes from the definition of "employee" anyone employed "in the domestic service of any family or person at his home." 29 U.S.C. § 152(3). The Association argues that the employees at issue in this case are "domestic" because they work for the owners in their individual home units, and in the common areas, which the Association claims are owned by the individual unit owners. The Association employs a total of five employees who perform various maintenance and cleaning services. The lead maintenance employee is responsible for the installation, repair and maintenance of various equipment in the common areas of the buildings, but his job occasionally requires him to enter an individual resident's unit to perform maintenance on air conditioning drain lines and condensation lines. The Association also employs a full-time painter who maintains the paint on the exterior and in the common areas of the buildings. The painter performs some additional painting for individual residents within their units, but he does that work on his own time and is compensated by the resident rather than the Association. Finally, the Association employs three cleaners that are responsible for cleaning the common areas, such as the elevators, lobbies, catwalks and stairwells, and collecting newspapers from the trash bin for recycling.

The Association argues that the Board erred in finding that these employees are not "domestic" employees within the meaning of Section 2(3) of the Act. However, in *30 Sutton*

Place Corp., 240 NLRB 752, 753 n.6 (1979), the Board held:

> [T]here is a substantial difference between employment by a single homeowner and employment by a cooperative or condominium entity. In the first instance, an individual and personal relationship is created between the homeowner and the employee; in the second instance, the employee's relationship with the employer, the cooperative or condominium entity, is no different from that of an employee performing similar work for an apartment house or office building entrepreneur. "Domestic service implies employment on an individual and personal basis and cannot be enlarged to include a maintenance crew or clerical staff for a [47] unit housing complex." *Success Apartments, Inc. v. UAW, Local 376,* 99 LRRM 3169, 3171 (1978).

See also *Ankh Services, Inc.*, 243 NLRB 478 (1979).

Subsequently, in *NLRB v. Imperial House Condominium, Inc.*, this Court followed the Board's decisions in *30 Sutton Place* and *Ankh,* in rejecting a Condominium's contention that employees involved in housekeeping activities were exempt from the Act's coverage as "domestic" employees under Section 2(3):

> It is clear that the Condominium's housekeepers are not employed by the unit owners in whose home the housekeepers provide their services.

> Although the housekeepers do render services to the unit owners, they nevertheless perform these services on behalf of and are clearly employed by the Condominium, a Florida corporation.

831 F.2d 999, 1005 (11th Cir.1987). Based on this Court's decision in *Imperial House,* we believe there is substantial evidence to support the Board's finding that the employees at issue in this case are employed by the Association, rather than the individual unit owners. Thus, the Board was warranted in holding that these employees are not exempt from the Act because they are not domestic employees within the meaning of Section 2(3).

The Association argues that the United States Supreme Court's decision in *NLRB. v. Kentucky River Community Care, Inc.,* 532 U.S. 706, 121 S.Ct. 1861, 149 L.Ed.2d 939 (2001), requires that we reverse our holding in *Imperial House.* The Association makes a strong effort to persuade us that the employees at issue in this case should be considered domestic employees who are exempt from the Act. However, we do not believe that the Supreme Court's decision in *Kentucky River* requires reversal of the *Imperial House* decision.

The Association makes additional arguments under Florida law and the United States Constitution. Specifically, the Association argues that applying the Act to its employees would destroy the concepts of state sovereignty and federalism, and would violate the United States Constitution in the following ways: (1) if the Union demanded money, this could be a "taking" of the unit owners' property in

violation of the Fifth Amendment; (2) if the Union demanded information, this could be an unlawful search in violation of the Fourth Amendment; (3) by striking, the Union could prevent someone from living in their own home, which would constitute a violation of due process; and (4) the Union could interfere with the rights of the unit owners in a manner that would be inconsistent with due process and equal protection. The Court has considered the Association's arguments, and finds them without merit.

Finally, the Association claims that it was prejudiced by rulings of the hearing officer which precluded it from introducing certain evidence at the hearing. For instance, the Association claims that it should have been allowed to question a Union representative about whether he lived in a condominium, and that it should have been allowed to introduce Exhibit 7 in its entirety into evidence. Upon consideration of these arguments, the Court finds that the rulings were within the discretion of the hearing officer, and do not constitute prejudicial error. Thus, the Association's arguments on this issue are also rejected.

Conclusion

We conclude that there is substantial evidence to support the Board's finding that the employees at issue in this case are not exempt from the Act because they are not domestic employees within the meaning of Section 2(3). Moreover, we reject the Association's constitutional and evidentiary arguments. Therefore, the Association's petition to set aside the Board's order is denied, and the Board's cross-application for enforcement of the order is GRANTED.

APPENDIX B — DECISION OF THE NLRB FILED SEPTEMBER 30, 2003

Shore Club Condominium Association, Inc., a/k/a S.C. Condominium Association, Inc. *and* International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO

Case 12-CA-23262

September 30, 2003

DECISION AND ORDER

CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on August 7, 2003,[1] the General Counsel issued the complaint on August 22, 2003, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following

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1. The Respondent's answer to the complaint states that it is without knowledge as to the filing date, service, or mailing dates of the charge by the Union, and therefore denies this allegation. However, copies of the charge and affidavit of service are attached as Exhs. G and 1 to the General Counsel's motion and the Respondent has not contested the authenticity of these documents. Further, the Respondent admits that it received a copy of the charge. Accordingly, we find that the Respondent has not raised any issue regarding filing and service of the charge warranting a hearing. See, e.g., *Corrections Corp. of America*, 330 NLRB 663 (2000), enfd. 34 F.3d 1321 (D.C. Cir. 2000).

the Union's certification in Case 12-RC-8915. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.

On September 11, 2003, the General Counsel filed a Motion for Summary Judgment. On September 15, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and cross-motion for summary judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification based on its contentions in the representation proceeding that the Board lacks jurisdiction and that the unit employees are in the domestic service of families and persons at their homes and, therefore, are not "employees" under Section 2(3) of the Act.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that

would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Florida corporation, with an office and principal place of business located at 1910 North Ocean Drive, Ft. Lauderdale, Florida, has provided maintenance and security services to condominium owners, most of whom are residents, at a complex consisting of two residential buildings located at 1901 and 1905 North Ocean Drive, Ft. Lauderdale, Florida, and a recreational facility located at 1912 North Ocean Drive, Ft. Lauderdale, Florida. During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from points outside the State of Florida.[3]

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2. The Respondent's cross-motion for summary judgment and request to dismiss the complaint are therefore denied.

3. The foregoing findings are consistent with the Regional Director's findings and the parties' stipulation in the representation proceeding.

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We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Certification

Following the election held April 17, 2003, the Union was certified on July 22, 2003, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by Respondent at its facility at Ft. Lauderdale, Florida excluding all office employees, security employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On various dates since about July 3, 2003, the Union has requested the Respondent to bargain, and, since about July 22, 2003, the Respondent has failed and refused. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

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Conclusions of Law

By failing and refusing on and after July 22, 2003, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.[4]

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in

4. We shall also order the Respondent to post the attached Notice to Employees. The General Counsel's complaint requests that the Respondent be ordered to post the Notice in English, Spanish, and Creole. However, the Respondent's answer generally denies that the requested relief is appropriate. Because there is no indication in the submitted record that the election notices in the underlying representation proceeding were posted in foreign languages, and the complaint or motion does not set forth any factual basis for posting the Notice in foreign languages, we shall leave to the compliance stage of this proceeding the determination of whether the Notice should also be posted in Spanish and Creole. See *Triple A Maintenance Corp.*, 283 NLRB 44, fn. 3 (1987).

good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Shore Club Condominium Association, Inc., a/k/a S.C. Condominium Association, Inc., Ft. Lauderdale, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Teamsters, Local Union No. 390. AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary, to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an

understanding is reached, embody the understanding in a signed agreement

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by Respondent at its facility, at Ft. Lauderdale, Florida excluding all office employees, security employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Ft. Lauderdale, Florida, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 22, 2003.

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5. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 1003

Robert J. Battista	Chairman
Wilma B. Liebman	Member
Dennis P. Walsh	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO as the exclusive representative of the employees in the bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employs, painters and cleaners, employed by us at our facility at Ft. Lauderdale, Florida excluding all office employees, security employees, guards and supervisors as defined in the Act.

SHORE CLUB CONDOMINIUM ASSN. A/K/A
S.C. CONDOMINIUM ASSN., INC.

APPENDIX C — REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12 DATED MAY 16, 2003

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

Case 12-RC-8915

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., a/k/a S.C. CONDOMINIUM ASSOCIATION, INC.[1]

Employer

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION NO: 390, AFL-CIO[2]

Petitioner

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1. The name of the Employer appears as amended at the hearing.

2 The name of the Petitioner appears as amended at the hearing, and as further amended to reflect the correct name of the International Union, and its affiliation with the AFL-CIO. I have taken official notice of the correct name of the International Union and its affiliation with the AFL-CIO. See www.teamster.org/about/constitution/article_i_.htm and www.aflcio.org/aboutunions/unions/.

Appendix C

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

Shore Club Condominium Association, Inc., also known as (a/k/a) S.C. Condominium Association, Inc. (the Employer) provides maintenance and security services to condominium owners, most of whom are residents, at a complex located in Fort Lauderdale, Florida. The complex consists of two residential buildings, located at 1901 North Ocean Drive (the South building) and 1905 North Ocean Drive (the East building), and a recreational facility at 1912 North Ocean Drive. There are 192 units in the two residential buildings, which are high rise towers located on the west side of Route A1A, i.e. across A1A from the Atlantic Ocean. The recreational area includes beach property, a recreational building and a pool.

International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO (the Petitioner) filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking certification as the collective bargaining representative of a unit of maintenance and security employees who "are really concierges," excluding office employees and management officials. A hearing in this matter was held before a hearing officer. Following the hearing, the parties each filed briefs with me.

The parties took different positions regarding the following issues:

(1) The Petitioner asserts that the Board has jurisdiction over the Employer's operations, whereas the Employer denies that it is engaged in commerce within the meaning of the

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National Labor Relations Act (the Act).

(2) The Employer refused to stipulate to the Petitioner's status as a labor organization. The Petitioner asserts that it is a labor organization within the meaning of Section 2(5) of the Act.

(3) The Petitioner contends that the petitioned-for employees are employees within the meaning of Section 2(3) of the Act,[3] whereas the Employer asserts that they are individuals employed in the domestic service of families or persons at their homes, and therefore that the petition should be dismissed. The Employer further argues, in effect, that the United States Constitution requires this conclusion.

(4) The Employer further contends that the security employees in the petitioned-for unit are employed as guards as set forth in Section 9(b)(3) of the Act (i.e. they are employed as guards to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the Employer's premises), and that, assuming for the sake of argument that the maintenance employees are employees within the meaning of the Act, the petitioned-for unit is inappropriate because it includes guards and non-guards. The Employer also asserts that under Section 9(b)(3) of the Act, the Petitioner cannot be certified as the representative of the Employer's security employees because it admits to membership employees other than guards. The

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3. The Petitioner also stated its willingness to proceed if the petitioned-for unit is found inappropriate and an alternative unit is found appropriate.

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Petitioner contends that the Employer's security employees are not guards.

(5) Finally, the Employer contends that the hearing officer made prejudicial errors in excluding certain documents and testimony, and, simultaneously with the filing of its post-hearing brief, the Employer filed a motion to reopen the record to introduce the employment application of an employee witness into evidence. The Petitioner has not replied to the Employer's motion.

I have considered the evidence and arguments presented by the parties on each of the issues. As discussed below, I conclude that the Board should assert jurisdiction over the Employer's operations; the Petitioner is a statutory labor organization; the Employer's employees are employees within the meaning of the Act and are not domestics; the employees who perform security functions are guards and should be excluded from the unit; the hearing officer's evidentiary rulings are free from prejudicial error; and the Employer's motion to reopen the record is denied. Accordingly, I have directed an election in a unit that consists of approximately five employees. To provide a context for my discussion of the issues, I will first provide the relevant factual background in this case. Then, I will present in detail the facts and reasoning that support each of my conclusions on the issues.

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RELEVANT FACTUAL BACKGROUND

The Employer has a board of directors, which is elected by the individual members and operates the condominium on their behalf. Most of the owners, or members, of the Employer live in the units they own, although there are 11 or 12 non-resident owners.

The Employer's resident manager reports directly to the board of directors, and supervises the Employer's entire staff on a day-to-day basis.[4] The resident manager occupies one of the 192 residential units and is available 24 hours a day, seven days a week. It appears that he functions like a building superintendent in an apartment complex.

The supervisor reports directly to the resident manager. There are six security employees who report to the supervisor and the resident manager. In addition, the Employer employs a main, or lead maintenance employee,[5] and four other maintenance employees, including one who functions primarily as a painter, and three cleaners who perform janitorial functions. The maintenance employees report to the resident manager.

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4. The parties stipulated, and I find, that Richard Thornton, the resident manager, and Kevin Noble, the supervisor (also referred to as the lead guard), are supervisors within the meaning of Section 2(11) of the Act inasmuch as they hire, fire or discipline employees, and that Shirley Peffer, office manager, has authority to discipline employees and is also a supervisor within the meaning of Section 2(11) of the Act.

5. There is no contention or evidence that the main, or lead, maintenance employee is a statutory supervisor.

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The complex has two security offices. The upper security office is glassed in and located at the top of the main entrance ramp to the complex, where there are security gates. It is staffed by a security employee at all times. The office contains seven electronic monitors, phones, and receivers from speakers in the garage. The monitors resemble small television screens and display views from cameras dispersed through the property. The cameras are always on. The upper security office employees continually monitor the gates and other areas of the property (including a tunnel under Route A1A, between the recreational area and the residential buildings) at all times, via motion detectors and via the security monitors in the upper security office.

The lower security office is located at the rear of the building and is also adjacent to an automatic gate entrance. There are no electronic monitors at that office.

Some residents may have personal security alarm systems installed in their units, but the Employer's security employees are not responsible for monitoring such personal security systems.

The Employer has maintained a security manual since about 1991. According to the resident manager, the security manual is issued to all newly hired security employees, who are required to read it. It is undisputed that copies of the security manual are maintained in the security offices for reference. However, one security employee, who has worked for the Employer in that capacity for a year, testified that he was never told to read the security manual, and has never referred to it.

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The security employees do not carry or have access to any weapons. The Employer does not require its security employees to be licensed or certified, or to have any specific skills other than proficiency in English. It prefers to hire security employees who have some security experience, experience in the hotel or motel industry, or other experience dealing with the public. The Employer checks references on applicants for security positions but does not call the police and ask for fingerprints. Similar reference checks may be made on applicants for maintenance employee (cleaner) positions. There is some evidence that newly hired upper gate security employees receive two days of on-the-job training from the supervisor, or lead guard, and newly hired lower gate security employees receive two days of on-the-job training from the lower gate security employee who works on the day shift. However, a security employee testified that his training consisted of a 45 minute tour of the property given by the supervisor, and instructions to greet guests, accept packages, call cabs for residents, and help residents with luggage from time to time, and that he never received any other training from the Employer. The same employee concedes that before working for the Employer he had substantial experience as a security guard working for security contractors.

Security employees working in the upper security office deal primarily with guests of residents, and package deliveries for residents, and observe the surveillance monitors. They announce the arrivals of guests to residents and will not allow the guests to enter without permission from the resident in question. They also keep logs of guest visits and direct guests as needed. In addition, they are the primary contact in emergency situations and are responsible for calling 911 or

calling the resident manager to report certain types of security incidents. They inform residents about the arrival of packages, and sometimes help residents with carrying packages to their units. Security employees also retain custody of a resident's package in the upper security office until the delivery can be made directly to the resident.

Security employees assigned to the lower security office deal primarily with contractors, delivery persons and other commercial visitors, who are required to park their vehicles at the rear of the premises, and who are not admitted without confirmation from the relevant resident to the security employees. Commercial visitors are given an identification badge (or sticker) that shows the building and unit which they are to visit. In addition, the security employees at the lower security office maintain a log showing the visiting worker's name, company name, time in and out, unit visited, and vehicle license. If such commercial visitors approach the upper gate or park in the upper garage, the security personnel at that location send them to the lower security office. The Employer's security employees require trades-people to leave its premises after 5:00 P.M., and also enforce the rule that guests may not use recreation facilities without permission.

After issuing the identification badge the security employee at the lower security office locks down the lower gate and escorts the commercial visitor to the appropriate elevator (which is key-operated) and directs him or her to the proper floor. If the visitor refuses to wear the badge, the security employee is to deny him entrance and call the supervisor. In addition, the security employees at the lower

gate are responsible for installing protective pads and flooring in elevators when needed to protect them from tools, equipment or other items being delivered or moved by commercial visitors.

Both security employees and maintenance employees wear radios to communicate with co-workers and supervisors. In case of emergency there is a phone at the recreation center, which calls directly into the upper security office. In the exercise room there is a button that lights up an exterior light placed so that it can be seen by the security employees through a glass plate from their normal workstation.

Security employees lock down the lower gates each night at about 9:00 p.m. At that point the security employee assigned to that location starts making rounds, checking all areas of the recreation center, going up elevators and to the roofs of the two residential, buildings. There is evidence that they make these rounds two times during a typical night shift. When security employees see trespassers during their rounds, the trespassers are often residents of neighboring properties, using the Employer's property as a shortcut. In those instances, the security employees simply file an incident report and permit the trespasser to continue. However, if the trespasser is someone unknown to the security employee, the security employee is to ask the trespasser to leave the premises. If they refuse, the security employee files an incident report and notifies the resident manager, but is not supposed to physically force the trespasser to leave.

Security staff is responsible for filing incident reports regarding any problems or breaches of the condominium rules

and regulations. These may range from domestic disturbances to vandalism to relatively minor matters such as a pickup truck parked in the upper garage, or a trespasser on a bicycle. Upper level security employees are also responsible for calling 911 as needed. However, it appears that most often security employees simply report incidents to the resident manager.

The resident manager recalls only three incidents during his 22 months on the job when the police were called to the Employer's premises, two times as a result of deaths, and once because of damage to a light. The resident manager was personally involved in all three of these calls, and it does not appear that security employees made any of these calls.

The recreation center is locked but residents have access using a key, which also provides access to certain elevators and the front entrances of the two residential towers. The security guards carry a master key that allows access to almost all areas. The security employees also hold certain keys, including those for locks on chains restricting access to the Employer's grilling facilities. However, security employees do not have access to the individual residents' units and they may only enter individual units when accompanied by their supervisor.

The resident manager testified that apart from the occasional courtesy assistance to residents, for example with a heavy package, security guards perform only security functions. In specific they do not perform concierge functions

such as identifying dining and entertainment options, securing reservations and such, and although they may occasionally get a cab for a resident this is not part of their job. A security employee testified that he calls cabs for residents about two or three times a Week, that he was told that was part of his job, and that he has assisted residents with packages on about 40 occasions, although in most instances, he merely delivers the packages a short distance from the security office to the resident's car.

The only cleaning or maintenance function performed by the Employer's security employees, is to clean occasional messes when no maintenance employee is on duty and to keep the security offices neat. There is no evidence that security employees ever substitute for maintenance employees.

The security staff wears white shirts with the Employer's logo on one sleeve, and their names on the other, and black pants. This is distinct from the maintenance employees' dark khaki uniforms. The security employees do not wear any marking or badge which identifies them as security guards.

The duties of the maintenance employees are distinct from those of security employees, although on rare occasions the main maintenance employee has worked as a substitute security employee for a portion of a day. The "main" maintenance employee does most of the installation and repairs of equipment and lighting and pool heaters, and performs indoor repairs and other maintenance work. Occasionally he needs to enter residential units to perform maintenance on air conditioning drain lines and condensation

lines. A second maintenance employee spends 90 to 95 percent of his time painting outside. Occasionally, he performs work inside residential units for individual residents, and is compensated directly by those individuals. However, the painter is on his own time and is not working for the Employer when he performs work for an individual resident. The three maintenance employees who work as cleaners are primarily assigned to the South building, the East building and the recreational facility, respectively. Their, duties include cleaning elevators, lobbies, catwalks, and stairwells, i.e. common areas, and carrying recycling. They share some responsibilities for the common areas.

Security employees earn between about $7.75 per hour and $8.50 per hour. Maintenance employees earn comparable wages, except for the main maintenance employee, whose wages are considerably higher. All employees receive similar health insurance and other benefits.

The upper security office employees work the following shifts: from 6:30 a.m. to 2:30 p.m., from 2:30 p.m. to 10:30 p.m., and from 10:30 p.m. to 6:30 a.m. seven days a week. The lower security office employees work from 8:00 a.m. to 4:00 p.m. and from 4:00 p.m. to midnight, Mondays to Fridays, and from 8:00 a.m. to 1:00 p.m. on Saturdays. The lower gate is locked at other times. Maintenance employees cover the hours from 7:30 a.m. to 6:00 p.m. weekdays and from 6:30 a.m. to 2:30 p.m. on weekends, except for the main maintenance employee, who works from 8:00 a.m. to 3:30 p.m. on Saturdays. The resident manager usually performs any maintenance work, which needs to be done when there are no other maintenance employees on duty. Occasionally the supervisor assists him in this work.

Appendix C

THE BOARD HAS JURISDICTION OVER THE EMPLOYER.

The parties stipulated that the Employer is a Florida corporation with its principal place of business located at 1910 North Ocean Drive, Fort Lauderdale, Florida, where it is engaged in the business of providing maintenance and security of residents, and that during the past 12 months, a representative period of time the Employer, in the course and conduct of its operations, derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $50,000 directly from points located outside the State of Florida. The Employer refused to stipulate to the conclusion that it is an employer engaged in commerce within the meaning of the Act. However, the Board has long held that it has jurisdiction over the operations of residential condominiums and cooperatives, which have gross annual revenues in excess of $500,000 and more than de minimis interstate commerce. *30 Sutton Place*, 240 NLRB 752 (1979); *Imperial House Condominium*, 279 NLRB 1225 (1986), affd. 831 F.2d 999 (11th Cir. 1987); *Riverdale Manor Owners Corp.*, 311 NLRB 1094, fn. 1 (1993).

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THE PETITIONER IS A LABOR ORGANIZATION WITHIN THE MEANING OF SECTION 2(5) OF THE ACT.

The record evidence establishes that the Petitioner represents employees for the purpose of collectively bargaining with employers as the exclusive representative of employees with respect to wages, hours and other terms and conditions of employment. Thus, the Petitioner has a number of collective-bargaining agreements with employers, which it administers on behalf of employees. It is further undisputed that the Petitioner admits employees to membership and that employees participate in the Petitioner's affairs by, among other things, attending meetings of its Executive Board and participating in collective-bargaining negotiations with employers. Based on all of the above I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

THE PETITIONED–FOR UNIT CONSISTS OF EMPLOYEES WITHIN THE MEANING OF SECTION 2(3) OF THE ACT RATHER THAN INDIVIDUALS EMPLOYED IN DOMESTIC SERVICE.

On this issue the Employer also seeks to overturn years of settled Board precedent, arguing that condominium employees are individuals employed in the domestic service of a family or person at his home. As established by the record in this case, the condominium employees work for the entire condominium association, rather than for any individual unit owner. The employees perform the vast majority of their work in common areas of the complex, which consists of 192 units and has substantial amenities such as recreational, parking,

security and maintenance services. On the rare occasions that the employees must enter individual units to perform their duties on behalf of the Employer, it is clearly to perform work on behalf of the condominium association as a whole, rather than as employees of an individual unit owner.

As the Board held in *30 Sutton Place Corporation*, 240 NLRB 752, 753 (1979):

> [U]nlike individual homeowners, present-day condominiums and cooperatives, consisting of numerous owners acting in concert to manage and maintain their collective properties, are engaged in business having a significant impact on interstate commerce. Accordingly, condominiums and cooperatives fall within the Act's jurisdictional mandate.

The Board's decision in *Ankh Services. Inc.*, 243 NLRB 478 (1979), further supports the conclusion that the Employer's employees are employees within the meaning of the Act rather than domestics, because the Employer consists of a condominium association rather than an individual homeowner or resident:

> Here we are not presented with a few individuals who are employed by the homeowner or resident of the home in which they perform their domestic services. Rather we are presented with a stipulated unit of approximately 40 persons, each of whom works from time to time in the homes or residences of numerous clients and all of whom

> are employed by the Employer and not by the clients. Thus **our focus is on the principals to whom the employer-employee relationship in fact runs and not merely on the undisputedly "domestic" nature of some of the services rendered.**

Ankh Services, Inc., 243 NLRB at 480 (emphasis supplied, footnotes omitted); see also *Imperial House Condominium*, 279 NLRB 1225 (1986), affd. 831 F.2d 999 (11th Cir. 1987).

The Employer also contends that application of the Act to its employees would be unconstitutional because it would ignore the concepts of state sovereignty and federalism, in that the Florida state constitution and state statutes enable the use of a condominium legal structure and recognize condominium owners' right to claim a homestead exemption from taxes, and therefore the employees of a condominium are domestics and are not employees within the meaning of the Act. This strained argument does not withstand scrutiny. A finding that the employees of a condominium association are covered by the Act does not in any manner prevent the organization of condominium associations or negate the right of individual condominium owners to claim a homestead exemption under the Florida state constitution. Florida's sovereignty is not jeopardized by the Federal Government exercising jurisdiction over employees who are employed by an entity (a condominium), which is a creature of state law. Indeed all corporations are, in a sense, creatures of the states which incorporate them, but this does not preclude the assertion of federal jurisdiction over a corporation's employees and its labor relations.

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I also find the Employer's claims that the assertion of jurisdiction over its employees would lead to an assortment of other violations of the United States Constitution to be without merit. The Employer contends that: (1) if the Petitioner demanded money (from the Employer – presumably economic demands in collective-bargaining negotiations) and the Act was interpreted to allow a strike, this would be a "taking" of the homeowners' property; (2) if the Petitioner demanded information this could be an unlawful search; (3) by striking the Petitioner could prevent someone from living in their own home thus constituting cruel and unusual punishment; and (4) the Petitioner could interfere in homeowners' rights in a manner inconsistent with due process and equal protection. However, these purported consequences do not flow from the Board's mere recognition of the rights of the Employer's employees under the Act, and of course, if the Petitioner was certified as the employees' representative, there would be limits on its rights under the Act.[6]

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6. Similarly, the policy arguments raised by the Employer in its brief are without merit.

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THE SECURITY EMPLOYEES ARE GUARDS WITHIN THE MEANING OF SECTION 9(b)(3) OF THE ACT AND MAY NOT BE INCLUDED IN A UNIT WITH THE EMPLOYER'S NON-GUARD EMPLOYEES.

THE PETITIONER MAY NOT BE CERTIFIED AS THE BARGAINING AGENT OF THE EMPLOYER'S SECURITY EMPLOYEES BECAUSE IT ADMITS NON-GUARDS TO MEMBERSHIP.

The Employer contends that the security personnel are guards as defined in the Act. The Petitioner contends that they are "concierges" and are not guards.

Section 9(b)(3) of the Act provides that the Board shall not:

> decide that any unit is appropriate . . . . if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the Employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

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A petition for employees found to be guards will be dismissed when the union, which seeks to represent them, has members who are not guards. *A.D.T. Co.*, 112 NLRB 80 (1955); *Brinks Incorporated of Florida*, 276 NLRB 1 (1985). It is undisputed that the Petitioner admits non-guards to membership. Accordingly, the real issue is whether the Employer's security employees meet the statutory definition of a guard.

In general the board and the Courts have held that employees are guards where their security function (enforcing safety and protection rules and regulations) is an essential rather than an incidental part of their duties and responsibilities. See *McDonnell Aircraft Co. v. NLRB*, 827 F2d. 324 (1987) (fire prevention workers); Baker Protective Services, 289 NLRB 562 (1988) (service technicians); *A.W. Schlesinger Geriatric Center* 267 NLRB 1363 (1983) (maintenance workers).

The Board has consistently found that an employee need not be in uniform or armed to be deemed a guard. Thus a janitor who monitored security cameras and checked people in at a security gate was found to be a guard. *PECO Energy Co.*, 322 NLRB 1074 (1997). Plainclothes security employees were included in a unit with uniformed guards, where the latter performed a range of traditional police functions. *Burns Security Systems*, 188 NLRB 222 (1971). In *Madison Square Garden*, 333 NLRB No. 77 (2001), the Board found that certain supervisors of event staff employees were guards within the meaning of the Act where the supervisors constituted an "essential part" of an employer's security procedures and regularly performed security functions, which required them to enforce rules against patrons and staff, and to protect the employer's facility, patrons and staff.

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The Petitioner seeks to show that the security employees in this case are not guards within the Act but instead perform a kind of concierge function. Petitioner cites *55 Liberty Owners Corp.*, 318 NLRB 308 (1995) as being particularly close to the instant facts. In *55 Liberty Owners* the Board found certain doorpersons and elevator operators were not guards although the doorpersons were expected to monitor surveillance monitors connected to cameras. The Board found their guard functions to be incidental to their other responsibilities.

> The doorpersons and elevator operators **do not make rounds**, are not trained in security, are not armed, are instructed not to use physical force, and do not present themselves as guards in their appearance. They do not perform other guard-like functions such as checking suspicious packages or asking off-duty employees to leave. Their guard-like functions of asking unauthorized persons to leave (or enforcing in some manner the no loitering and no-smoking rules) . . . are **incidental** to their primary non-guard duties and there is **no evidence that the doorpersons enforce rules against employees or other persons to protect the safety of persons on the premises or the property itself**.

55 Liberty Owners Corp. at 310 (emphasis added).

Contrary to the facts in *55 Liberty Owners*, in the instant case it appears that it is the non-guard duties which are incidental to the security employees' main guard functions

including making regular rounds and enforcing rules for the protection of residents and guests. Although the instant case is somewhat similar to the facts in *55 Liberty Owners* because the employees in question did announce visitors, delivery persons and contractors to residents, the employees in that case did not provide visitors with identification tags, or check on their whereabouts after 5:00 p.m. as the Employer's security employees do. Moreover, in addition to performing certain courtesy functions performed by the Employer's security employees, such as announcing visitors, accepting packages and mail, and carrying baggage on occasion, the employees in *55 Liberty Owners* were expected to greet and open doors for residents. These duties are more akin to "courtesy oriented and receptionist type" services than the duties regularly performed by the Employer's security employees.

Petitioner also cites *Ford Motor Company*, 116 NLRB 1995 (1956) where the Board found that a receptionist was not a guard. However, in that case, unlike the instant case, the receptionist did not monitor security cameras or motion detectors, make rounds, or take independent steps to enforce security rules against visitors or guests. In making its finding in *Ford Motor Company*, the Board relied on the fact that the receptionist needed to call in plant guards to enforce the security policies.

In the instant case the security employees are the only ones performing guard functions and they call either their manager or 911 depending on the situation. Indeed they are the only employees performing any kind of security function.

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Wolverine Dispatch, Inc., 321 NLRB 796 (1996), another case where a receptionist was not found to be a guard despite performing similar guard functions to the guards in the instant case, is also distinguishable because the receptionist's guard duties related solely to controlling entry to the front lobby, and they primarily involved secretarial and administrative duties, such as taking notes at meetings, doing clerical computer entry and arranging for employees' uniforms.

The security employees in the instant case more closely resemble the employees found to be guards in *Rhode Island Hospital*, 313 NLRB 343, 345-347 (1993) (security dispatchers were guards because they monitored closed circuit TV systems, were directly responsible for being alert to any incident, situation, or problem which needs responsive action and for reporting such incidents to the proper authorities); *MGM Grand Hotel*, 274 NLRB 139, 140 (1985) (the operators of a security system served to monitor and report possible security problems and infractions and possible life-endangering situations, even where other, armed security guards were primarily responsible for enforcing security and compliance with rules); *AW Schlesinger Geriatric Center*, 267 NLRB 1363 (1983) (security employees at a residence for the aged had no training, weapons, or uniforms, and continued to perform maintenance functions, but sometimes confronted trespassers and devoted 50 to 70 percent of their time to security work); *Crossroads Community Correctional Center*, 308 NLRB 558, 562 (1992) (employees at an inmate work release program were found to be guards even though they were told not to use physical force but to call the police or supervisors; they had no specific training, uniforms, or weapons; and they accompanied residents who were going

out to work, prepared reports on property damage, checked for fire hazards and contraband possessions, received calls, and received packages).

Based on the above, I find that the Employer's security employees are guards within the meaning of Section 9(b)(3) of the Act, and should be excluded from the unit sought by the Petitioner.

THE HEARING OFFICER'S EXCLUSION OF EVIDENCE WAS PROPER AND DOES NOT CONSTITUTE PREJUDICIAL ERROR. THE EMPLOYER'S MOTION TO REOPEN THE RECORD IS DENIED.

The Employer complains that the hearing officer improperly precluded it from introducing certain evidence. The Employer's contentions are without merit.

The Employer's attempt to engage in a detailed examination of the employment experience of a security employee before he worked for the Employer was correctly deemed irrelevant by the hearing officer. As the hearing, officer correctly found, the relevant inquiry concerned the witness' employment with the Employer, rather than his previous employment. Moreover, the hearing officer afforded the Employer substantial latitude in cross-examining the witness with respect to his previous employment before making her ruling. In addition, the Employer's motion to reopen the record to introduce that same witness' application for employment with the Employer to show that he applied for a security position, rather than for "any position," as he

testified, is denied. The Employer has made no showing or claim that the application in question was newly discovered or was unavailable at the time of the hearing, as is required pursuant to Section 102.65(e)(1) of the Board's Rules and Regulations. Yet, the Employer failed to file its motion or offer the application in evidence until it filed its brief in this matter, two weeks after the hearing.

With respect to the Employer's claim that the hearing officer improperly precluded its questioning of the Petitioner's agent as to whether he was a condominium owner and as to the Petitioner's potential representation of the petitioned-for unit, it appears from the Employer's brief and arguments at the hearing that the Employer was engaged in pure speculation that the Petitioner's agent may be a condominium owner. Accordingly, I find that the hearing officer properly precluded the Employer from pursuing that line of questioning.

Finally, the Employer claims that the hearing officer should have permitted it to introduce in evidence the portion of Employer Exhibit 7, which consists of approximately 112 pages of condominium documents.[7] However, when the hearing officer attempted to ascertain which portion of the lengthy document the Employer sought to rely upon, counsel for the Employer refused to specify any portion. Therefore, the hearing officer properly rejected the exhibit and placed it in a rejected exhibit file. Moreover, in his brief, counsel for the Employer cites the rejected exhibit only for the

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7. The portion of Employer Exhibit 7 consisting of the Employer's articles of incorporation was admitted in evidence.

proposition that a condominium owner cannot sell or lease his or her unit without the permission of the other owners. However, the President of the Employer's Board of Directors testified to this very point and his testimony was undisputed. Accordingly, I have considered this evidence in reaching the above conclusions.

For the foregoing reasons, I find that all of the Employer's assertions that the hearing officer committed prejudicial error are without merit, and the Employer's motion to reopen the record is denied.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Petitioner, a labor organization, seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate[8] for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time maintenance employees, including but not limited to the main or lead maintenance employee, painters and cleaners, employed by the Employer at its facility at Ft. Lauderdale, Florida, excluding all office employees, security employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among employees in the unit found appropriate above. The employees will vote on the question of whether or not they wish to be represented by the International Brotherhood of Teamsters, Local Union No. 390, AFL-CIO for the purposes of collective bargaining. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this decision.

A. *Voter Eligibility*

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately

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8. As noted above, at the hearing the Petitioner indicated that it wished to proceed to an election in an alternative unit if the petitioned-for unit was found inappropriate.

before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that began less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. *Employer to Submit List of Eligible Voters*

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966), *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

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Accordingly it is hereby directed that within 7 days of this Decision; the Employer must submit to the Regional Office, an election eligibility list, containing the full names and addresses of all the eligible-voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 201 East Kennedy Boulevard, Suite 530, Tampa, Florida 33602-5824, on or before May 23rd, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. If you have any questions, please contact the Regional Office.

C. *Notice of Posting Obligations*

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuously visible to potential voters for a minimum of 3 full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration*

Services, 317 NLRB 349 (1995). An employer who fails to do so may not file objections based on the non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST, on May 30, 2003. This request may not be filed by facsimile.

DATED at Tampa, Florida, this 16th day of May 2003.

Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Boulevard, Suite 530
Tampa, FL 33602

CLASSIFICATION INDEX

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No. 04-1603

In the Supreme Court of the United States

SHORE CLUB CONDOMINIUM ASSOCIATION, INC., AKA SC CONDOMINIUM ASSOCIATION, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably found that individuals employed to perform maintenance work in the common areas of a condominium complex were employees under Section 2(3) of the National Labor Relations Act, 29 U.S.C. 152(3), and not excluded from the Act's coverage as "employed * * * in the domestic service of any family or person at his home" under that section.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 400 F.3d 1336. The decision and order of the National Labor Relations Board (Pet. App. 9a-17a) is reported at 340 N.L.R.B. No. 82. The decision and direction of election of the Board's regional director for Region 12 (Pet. App. 18a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 2005. The petition for a writ of certiorari was filed on May 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 2(3) of the National Labor Relations Act (NLRA or Act) defines "employee" for purposes of the Act. That definition excludes "any individual employed * * * in the domestic service of any family or person at his home." 29 U.S.C. 152(3).

In determining whether an employee is "employed * * * in the domestic service of any family or person at his home" under Section 2(3), the National Labor Relations Board focuses "on the principals to whom the employer-employee relationship *in fact* runs and not merely on the * * * 'domestic' nature of * * * the services rendered." *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 480 (1979). The Board, with judicial approval, has held that workers performing maintenance and cleaning work at a condominium are not employed "in the domestic service of any family or person at his home," where they perform those services "on behalf of and are clearly employed by" the incorporated condominium association. See *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d 999, 1005 (11th Cir. 1987).

2. Petitioner is a nonprofit Florida corporation that provides maintenance and security services to condominium owners at a condominium complex consisting of two high rise residential buildings, which have a total of 192 condominium units, and one recreational facility. Pet. App. 2a, 11a, 19a, 30a. Petitioner is controlled by a board of directors, which is elected by the owners of the condominium units. *Id.* at 22a. A resident manager supervises petitioner's entire staff and reports directly to the board of directors. *Ibid.* He functions like a building superintendent in an apartment complex and is available 24 hours a day, seven days a week. *Ibid.*

Petitioner employs five maintenance employees, including one lead maintenance worker, one painter, and three janitors, all of whom report to the resident manager. Pet. App. 22a. They wear dark khaki uniforms, *id.* at 28a, and use radios to communicate with one another, *id.* at 26a. The lead maintenance employee is responsible for installing, repairing, and maintaining equipment, such as lighting and pool heaters, in the common areas of the building. *Id.* at 5a, 28a. Occasionally he enters residential units to perform work on behalf of petitioner, such as maintenance on air conditioning drain lines and condensation lines. *Id.* at 5a, 28a, 32a. The painter spends 90 to 95% of his time painting outside. On his own time, he may perform work inside residential units and receive payment directly from the individual resident. *Id.* at 29a. Each of the three janitors is assigned to one of the three buildings. The janitors spend their time carrying recycling materials and cleaning common areas, such as the elevators, lobbies, catwalk, and stairwells. *Ibid.*

3. On April 3, 2003, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 390, AFL-CIO (Union), filed a petition with the Board seeking certification as the collective-bargaining representative of petitioner's five maintenance employees.[1] Pet. App. 2a. Petitioner opposed the Union's election petition, claiming, *inter alia*,

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[1] The Union's petition sought to include petitioner's security employees in the bargaining unit. The Board's regional director concluded that those security employees were guards, who, under Section 9(b)(3) of the NLRA, 29 U.S.C. 159(b)(3), could not be represented in a unit that included nonguards. Pet. App. 35a-40a. The Union did not contest that ruling. The status of petitioner's security employees was therefore not before the court of appeals and is not before this Court.

that the petitioned-for unit was inappropriate, because the maintenance employees were employed in the domestic service of families or persons at their homes and therefore excluded by Section 2(3) of the Act. *Ibid.*

Following a hearing, the Board's regional director issued a decision, finding, in relevant part, that petitioner's maintenance employees were covered by the Act and directing an election in a unit of "[a]ll full-time and regular part-time maintenance employees * * * employed by [petitioner] at its facility in Ft. Lauderdale, Florida." Pet. App. 3a, 12a, 43a. In finding that the five maintenance workers were not individuals "employed * * * in the domestic service of any family or person at his home," the regional director "focus[ed] * * * on the principals to whom the employer-employee relationship in fact runs." Pet. App. 33a (quoting *Ankh Servs., Inc.*, 243 N.L.R.B. 478, 480 (1979), and citing *Imperial House Condominium*, 279 N.L.R.B. 1225 (1968), aff'd, 831 F.2d 999 (11th Cir. 1987)). The regional director observed that "[t]he employees perform the vast majority of their work in common areas of the complex," Pet. App. 31a, and that when they enter individual units on rare occasions to perform maintenance on air conditioning lines, they perform work on behalf of petitioner, and not as employees of individual unit owners. *Id.* at 29a, 32a. The regional director concluded that the five maintenance employees "work for the entire condominium association, rather than for any individual unit owner." *Id.* at 31a.

The regional director rejected petitioner's contention that applying the Act to its maintenance employees would violate principles of state sovereignty and federalism because the State recognizes the use of the condominium legal structure and permits condominium own-

ers to claim a homestead exemption on their state tax returns. Pet. App. 33a. The regional director explained that application of the Act would neither prevent the organization of condominium associations nor preclude individual condominium owners from claiming a homestead exemption under the Florida state constitution. *Ibid.* The regional director further explained that "Florida's sovereignty is not jeopardized by the Federal Government exercising jurisdiction over employees who are employed by an entity (a condominium), which is a creature of state law." *Ibid.* The regional director noted that corporations, like condominiums, are "creatures of the state which incorporate[s] them, but this does not preclude the assertion of federal jurisdiction over a corporation's employees and its labor relations." *Ibid.* Rejecting petitioner's remaining constitutional claims, based on the Fourth and Fifth Amendments, the regional director found that the Board's recognition of the rights of employees would not itself result in any of the consequences—such as a taking of the owners' property or the imposition by the government of "cruel and unusual punishment"—that petitioner claimed would violate its constitutional rights. *Id.* at 34a. The Board subsequently denied petitioner's request for review of the regional director's decision and direction of election. *Id.* at 3a.

On June 11, 2003, the regional director conducted a secret-ballot election in the specified unit. Pet. App. 3a. By a 5-0 vote, the Union won the election. *Ibid.* The regional director then certified the Union as the exclusive collective-bargaining representative of petitioner's maintenance employees. *Id.* at 3a, 12a, 43a.

When petitioner subsequently refused to bargain, the Union filed an unfair labor practice charge. Pet. App.

3a, 12a. The Board's General Counsel issued a complaint, alleging that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. 3a. Finding that all issues relevant to the unfair labor practice charge were, or could have been, litigated in the representation proceeding, the Board granted summary judgment, decreeing that petitioner had violated Section 8(a)(5) and (1) of the Act, and ordered petitioner to bargain on request with the Union. *Id.* at 10a-13a.

4. Petitioner filed a petition for review in the court of appeals, and the Board filed a cross-application for enforcement of its order. The court of appeals denied the petition for review and enforced the Board's bargaining order. Pet. App. 1a-8a.

The court of appeals upheld the Board's determination that petitioner's maintenance workers did not fall within the "domestic service" exemption of Section 2(3), relying on its prior decision in *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d 999, 1001, 1005 (11th Cir. 1987). In that case, the court had held that employees involved in housekeeping activities at a condominium were not exempt as "domestic" employees, because they were not employed by owners of condominium units to whom the housekeepers rendered services, but performed their services "on behalf of and are clearly employed by the Condominium, a Florida corporation." *Ibid.* Noting the evidence that the five maintenance workers employed by petitioner similarly work almost exclusively in the common areas, the court held that substantial evidence supported the Board's finding "that the employees at issue in this case are employed by the Association, rather than the individual unit owners," and that therefore the Board "was warranted in holding that

these employees are not exempt from the Act because they are not domestic employees within the meaning of Section 2(3)." Pet. App. 7a.

The court summarily rejected petitioner's contention that this Court's decision in *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001), required a different result. Pet. App. 7a. The court also summarily rejected petitioner's constitutional arguments. *Id.* at 7a-9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. As this Court has recognized, the Board's interpretation of the term "employee" in Section 2(3) of the Act is entitled to deference if it is based on a reasonable construction of the statute. *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398-399, 409 (1996) ("appropriate weight * * * must be given to the judgment of the agency whose special duty is to apply th[e] broad statutory language to varying fact patterns") (citing *Bayside Enters., Inc.* v. *NLRB*, 429 U.S. 298, 304 (1977)); see *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 437, 843 (1984). As this Court has further recognized, the Board and reviewing courts "must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." *Holly Farms Corp.*, 517 U.S. at 399. Consistent with those principles, the court of appeals correctly affirmed the Board's determination that the maintenance employees employed by the condominium association are "employee[s]" and are not "employed